UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DASHA M. MARUSH, Plaintiff, v. MICHAEL J. ASTRUE, Commissioner of Social Security, Defendant.	CASE NO. C10-5488-JLR REPORT AND RECOMMENDATION

Plaintiff Dasha M. Marush appeals the final decision of the Commissioner of the Social Security Administration ("Commissioner") which denied her applications for Disability Insurance Benefits ("DIB") and Supplemental Security Income ("SSI") under Titles II and XVI of the Social Security Act, 42 U.S.C. §§ 401-33 and 1381-83f, after a hearing before an administrative law judge ("ALJ"). For the reasons set forth below, the Court recommends that the Commissioner's decision be REVERSED and REMANDED.

I. FACTS AND PROCEDURAL HISTORY

Plaintiff was born in 1962 and was 47 years old at the time of the hearing before the ALJ. (Administrative Record ("AR") 30, 126.) She completed high school and a four-year

college degree in race-track management. (AR 30, 161, 234, 461, 667, 747.) Her past work experience includes employment as a customer service manager, human services worker, pari-mutuel inspector, photo finisher operator, race official, and regulatory analyst. (AR 25, 157, 164.)

Plaintiff asserts that she is disabled due to asthma, anemia, depression, fatigue, joint pain and muscle pain, and stroke. (AR 156.) She asserts an onset date of October 31, 2002. (AR 126, 131.)

The Commissioner denied plaintiff's claim initially and on reconsideration. (AR 77-80, 82-83.) Plaintiff requested a hearing, which took place on May 27, 2009. (AR 87-88, 27-72.) The ALJ heard testimony from plaintiff and medical expert William Newman, M.D. (AR 27-72, 116-18.) On July 15, 2009, the ALJ issued a decision finding plaintiff not disabled. (AR 14-26.)

Plaintiff's administrative appeal of the ALJ's decision was denied by the Appeals Council (AR 1-5), making the ALJ's ruling the "final decision" of the Commissioner as that term is defined by 42 U.S.C. § 405(g). On July 12, 2010, plaintiff timely filed the present action challenging the Commissioner's decision. (Dkt. 3.)

II. JURISDICTION

Jurisdiction to review the Commissioner's decision exists pursuant to 42 U.S.C. §§ 405(g) and 1383(c)(3).

III. STANDARD OF REVIEW

Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's denial of social security benefits when the ALJ's findings are based on legal error or not supported by

substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 (9th Cir. 2005). "Substantial evidence" is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 201 (1971); *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989). The ALJ is responsible for determining credibility, resolving conflicts in medical testimony, and resolving any other ambiguities that might exist. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). While the Court is required to examine the record as a whole, it may neither reweigh the evidence nor substitute its judgment for that of the Commissioner. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). When the evidence is susceptible to more than one rational interpretation, it is the Commissioner's conclusion that must be upheld. *Id*.

The Court may direct an award of benefits where "the record has been fully developed and further administrative proceedings would serve no useful purpose." *McCartey v. Massanari*, 298 F.3d 1072, 1076 (9th Cir. 2002) (citing *Smolen v. Chater*, 80 F.3d 1273, 1292 (9th Cir. 1996)). The Court may find that this occurs when:

> (1) the ALJ has failed to provide legally sufficient reasons for rejecting the claimant's evidence; (2) there are no outstanding issues that must be resolved before a determination of disability can be made; and (3) it is clear from the record that the ALJ would be required to find the claimant disabled if he considered the claimant's evidence.

Id. at 1076-77.

IV. DISCUSSION

As the claimant, Ms. Marush bears the burden of proving that she is disabled within the meaning of the Act. *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The Act defines

disability as the "inability to engage in any substantial gainful activity" due to a physical or mental impairment which has lasted, or is expected to last, for a continuous period of not less than twelve months. 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). A claimant is disabled under the Act only if her impairments are of such severity that she is unable to do her previous work, and cannot, considering her age, education, and work experience, engage in any other substantial gainful activity existing in the national economy. 42 U.S.C. § 423(d)(2)(A); *see also Tackett v. Apfel*, 180 F.3d 1094, 1098-99 (9th Cir. 1999).

The Commissioner follows a five-step sequential evaluation process for determining whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920. At step one, it must be determined whether a claimant has engaged in substantial gainful activity. 20 C.F.R. §§ 404.1520(b), 416.920(b). The ALJ found plaintiff has not engaged in substantial gainful activity since October 31, 2002, the alleged onset date. (AR 16.) At step two, it must be determined whether a claimant suffers from a severe impairment. The ALJ found plaintiff has the following severe impairments: degenerative disc disease, status post cardiovascular accident, and obesity. (AR 16.) Step three asks whether a claimant's impairments meet or medically equal a listed impairment. The ALJ found plaintiff does not have an impairment or combination of impairments that meets or medically equals a listed impairment. (AR 21.) If the claimant's impairments do not meet or equal a listing, the Commissioner must assess residual functional capacity ("RFC") and determine at step four whether the claimant has demonstrated an inability to perform past relevant work. The ALJ found plaintiff has the RFC to perform light work, except for no sustained overhead work, no sustained neck straining, and no exposure to concentrated levels of pulmonary irritants. (AR 22.) If the claimant is able to

perform her past relevant work, she is not disabled; if the opposite is true, then the burden shifts to the Commissioner at step five to show that the claimant can perform other work that exists in significant numbers in the national economy, taking into consideration the claimant's RFC, age, education, and work experience. 20 C.F.R. §§ 404.1520(g), 416.920(g); *Tackett*, 180 F.3d at 1099-1100. The ALJ found plaintiff is capable of performing her past relevant work as a customer service manager, human services worker, pari-mutuel inspector, race official, and regulatory analyst. (AR 25.) The ALJ concluded plaintiff has not been under a disability from October 31, 2002, through the date of the decision. (AR 26.)

Plaintiff argues that the ALJ (1) erroneously evaluated the testimony of medical expert William Newman, M.D.; and (2) erred in finding her capable of performing her past relevant work at step four. (Dkt. 16.) She requests remand for further administrative proceedings. *Id*. at 11. The Commissioner argues that the ALJ's decision is supported by substantial evidence and should be affirmed. (Dkt. 17.) For the reasons described below, the Court agrees with the plaintiff.

A. Medical Expert Testimony

Plaintiff argues that the ALJ erroneously evaluated the opinion of medical expert William Newman, M.D., who testified that plaintiff would have difficulty with "prolonged working on a computer" (AR 66). (Dkt. 16 at 3-5.) Plaintiff contends that because the ALJ did not explicitly address Dr. Newman's testimony about plaintiff's ability to use a computer, he improperly rejected that testimony. *Id*. The Commissioner responds that the ALJ's limitation to "no sustained neck straining" (AR 22), properly incorporated Dr. Newman's testimony about computer usage. (Dkt. 17 at 5-6.)

> Dr. Newman testified, in part, as follows:
>
> A . . . There are certain occupations that people with neck trouble do have problems. Somebody, a lab technician that has to look into a microscope all day long. . . . even prolonged working on a computer may bother her. She'd have to do it intermittently because the neck muscles contract to maintain your gaze at a certain thing over long period of times. And you have to relieve that. . . . By changing positions.
>
> Q [by attorney] Well do you think if she had the ability to move her neck about and change positions throughout the day that she could do a job looking down at a table or computer?
>
> A If, if it was something that required looking into a microscope all day long, I'm thinking of things that may strain her neck. Perhaps driving a truck. She does drive a car. . . . And so she is able to look around.
>
> Q But, she doesn't do it all day.
>
> A No, she doesn't do it all day. So probably she can't be a truck driver or cab driver, especially in heavy traffic.
>
> Q Yeah. Do you think she could sit at a desk and assemble something at a table or write something eight hours a day?
>
> A Yes. Yes I do think so, something light.

(AR 66-67 (emphasis added).) As the Commissioner notes, when addressing computer usage, Dr. Newman specifically testified about "things that may strain her neck," and repeatedly used words such as "all day long," "prolonged," and "long period of times." (AR 67.) The ALJ reasonably incorporated Dr. Newman's testimony into his RFC assessment by limiting plaintiff to "no sustained neck straining." (AR 22.) Plaintiff acknowledges the "possibility" that the ALJ's limitation to "no sustained neck straining" incorporated Dr. Newman's testimony. (Dkt. 16 at 5.) Thus, the Commissioner agrees with plaintiff that the ALJ adopted Dr. Newman's testimony regarding computer usage into his RFC assessment. (Dkt. 17 at 5-6.)

In her reply brief, plaintiff acknowledges that the parties agree that the ALJ implicitly adopted Dr. Newman's testimony about computer usage. (Dkt. 18 at 2.) Because the parties agree that the ALJ adopted Dr. Newman's opinion regarding computer use, this issue is moot.

B. Step Four

At step four, the claimant bears the burden of proving that she can no longer perform her past relevant work. 20 C.F.R. §§ 404.1512(a), 404.1520(f); *Barnhart v. Thomas*, 540 U.S. 20, 25 (2003). Although the burden of proof lies with the claimant, the ALJ retains a duty to make factual findings to support his conclusion, including a determination of whether the claimant can perform the actual functional demands and job duties of her past relevant work or the functional demands and job duties of the occupation as generally performed in the national economy. *Pinto v. Massanari*, 249 F.3d 840, 844-45 (9th Cir. 2001) (citing Social Security Ruling ("SSR") 82-61). "This requires specific findings as to the claimant's residual functional capacity, the physical and mental demands of the past relevant work, and the relation of the residual functional capacity to the past work." *Id*. at 845 (citing SSR 82-62). RFC is the most a claimant can do considering her limitations or restrictions. SSR 96-8p. The ALJ must consider the limiting effects of all of plaintiff's impairments, including those that are not severe, in determining RFC. 20 C.F.R. §§ 404.1545(e), 416.945(e); SSR 96-8p. "[T]wo sources of information . . . may be used to define a claimant's past relevant work as actually performed: a properly completed vocational report, SSR 82-61, and the claimant's own testimony, SSR 82-41." *Pinto*, 249 F.3d at 845. A claimant may be found not disabled at step four based on a determination that she can perform past relevant work as it was actually performed or as it is generally performed in the national economy. SSR 82-61; SSR 96-8p.

In the present case, the ALJ determined that plaintiff could perform five of her past relevant jobs both as actually performed and as generally performed: customer service manager, human services worker, pari-mutuel inspector, race official, and regulatory analyst. (AR 25.) Plaintiff argues that the ALJ erred in failing to make adequate findings to support his determination that her RFC did not preclude performance of her past relevant work as actually performed and as generally performed. (Dkt. 16 at 7-11.)

The Commissioner concedes that substantial evidence does not support the ALJ's finding that plaintiff could perform her past relevant work as it is generally performed because the ALJ did not cite any evidence for the demands of plaintiff's five past relevant jobs as generally performed in the national economy. (Dkt. 17 at 6-7.) However, the Commissioner contends that any error was harmless "because an ALJ is only required to consider a claimant's past relevant work as it is generally performed when the claimant is not able to perform her past relevant work as it was actually performed." *Id*. at 7.

Because the ALJ was not required to determine whether plaintiff could perform her past relevant jobs as generally performed *and* as actually performed, the Court agrees with the Commissioner that the ALJ's error in finding that plaintiff could perform her past relevant work as it is *generally* performed in the national economy was harmless error. *See* SSR 96-8p. However, the Court finds substantial evidence does not support the ALJ's decision that plaintiff could perform her past relevant jobs as actually performed.

As plaintiff notes, the ALJ was required to make three distinct findings at step four: (1) a finding of fact as to the plaintiff's RFC, (2) a finding of fact as to the physical and mental demands of plaintiff's past jobs; and (3) a finding of fact that the plaintiff's RFC would permit

a return to her past jobs. SSR 82-62. Petitioner does not challenge the ALJ's RFC assessment, which limited plaintiff to light work and prohibited "sustained overhead work" and "sustained neck straining." (AR 22.) However, plaintiff argues that the ALJ failed to make sufficient findings of fact as to the physical demands of her past jobs and whether plaintiff's RFC would permit a return to her past jobs. (Dkt. 16 at 8-9.)

"The decision as to whether the [plaintiff] retains the functional capacity to perform past work . . . has far-reaching implication and must be developed and explained fully in the disability decision." SSR 82-62. The regulations require the ALJ to obtain adequate documentation of past work to support the decision as to the plaintiff's ability to return to past work. *Id.* "Adequate documentation of past work includes factual information about those work demands which have a bearing on the medical established limitations. Detailed information about strength, endurance, manipulative ability, mental demands and other job requirements must be obtained as appropriate." *Id.*

The Commissioner argues that the ALJ properly relied on plaintiff's description of her jobs in the Work History Report in determining that plaintiff could do her past relevant work as they were actually performed. (AR 164-77.) However, as plaintiff argues, her written descriptions indicate that the physical demands of her past jobs exceed the limitations adopted by the ALJ in his RFC assessment. For example, plaintiff indicated that her jobs as a customer service manager, human services worker, and race official entailed working more than forty hours per week, when the ALJ concluded that plaintiff has the RFC to stand or walk for only six hours in an eight hour workday. *See* SSR 83-10. Plaintiff also indicated that her job as a regulatory analyst required the ability to sit for seven hours out of an eight-hour workday, when

the ALJ concluded that plaintiff has the RFC to sit for only six hours maximum. *See* SSR 96-9p.; SSR 83-10; 20 C.F.R. § 404.1567(b) ("If someone can do light work, we determine that he or she can also do sedentary work.") In addition, plaintiff contends that her past work as a pari-mutuel inspector was inconsistent with her limitations because that work involved extensive use of computer and video monitors and the ALJ's RFC precluded "sustained neck straining." (Dkt. 16 at 8.) While the ALJ determined that plaintiff had the RFC to perform light work with "no sustained overhead work" and "no sustained neck straining," there was no evidence adduced at the hearing that this was consistent with how plaintiff actually performed her past jobs. As a result, the ALJ's finding that plaintiff could perform her past relevant work is not supported by substantial evidence.

The Commissioner argues that the Work History Report submitted by plaintiff was sufficiently clear to forego additional development. (Dkt. 17 at 8.) The Court disagrees with the Commissioner. Because the ALJ cited no evidence addressing the overhead reaching and sustained neck straining demands of each of plaintiff's jobs, the ALJ's conclusion that plaintiff's RFC would permit a return to her past jobs is speculation unsupported by the evidence in the record or any reasonable inference from that evidence. *Pinto*, 249 F.3d at 846 ("[F]inding that a claimant has the capacity to do past relevant work on the basis of a generic occupational classification of the work is likely to be fallacious and unsupportable.") Although the ALJ made specific findings about these limitations, he failed to explain how these limitations related to his finding that plaintiff could perform her past work as actually performed. *See Pinto*, 249 F.3d at 845. Moreover, an ambiguity arises from plaintiff's report that her jobs as customer service manager, human services worker, and race official required

her to work more than forty hours per week, and her job as a regulatory analyst required sitting for seven hours per workday. Accordingly, the ALJ did not develop an adequate record with respect to those demands.

The ALJ's finding that plaintiff's RFC does not preclude performance of her past relevant work as actually performed is not supported by the evidence of record. On remand, the ALJ is directed to solicit additional testimony from plaintiff regarding her past relevant work before concluding that she is able to perform it as actually performed. If the ALJ concludes that plaintiff is not able to perform her past relevant work as it was actually performed, the ALJ is directed to solicit testimony from a vocational expert that is consistent with the Dictionary of Occupational Titles before concluding that plaintiff is able to perform her past relevant work as it is generally performed, or concluding that plaintiff is able to perform other jobs existing in significant numbers in the national economy.

V. CONCLUSION

For the foregoing reasons, the Court recommends that this case be REVERSED and REMANDED for further administrative proceedings consistent with this opinion. A proposed order accompanies this Report and Recommendation.

DATED this 14th day of March, 2011.

Mary Alice Theiler
United States Magistrate Judge